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IN THE SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1980

KEITH FAIR,
PETITIONER

Vs.

STATE OF GEORGIA,
RESPONDENT.

NO. 79-6884

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, KEITH FAIR, who is now held in the Georgia Diagnostic and Classification Center, Jackson, Georgia, moves this Honorable Court to grant him leave to file the attached petition for a writ of certiorari to the Georgia Supreme Court without prepayment of costs and to proceed in forma pauperis.

In support of this motion petititioner has attached as Appendix A to this motion an affidavit executed by petitioner on June 27, 1980.

In further support of this motion, petitioner has attached as Appendix B to this motion an affidavit executed by petitioner on September 13, 1979.

WHEREFORE, petitioner respectfully moves this Honorable Court to grant him leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Respectfully Submitted,

George W. Brinson

George W. Brinson
LEADING COUNSEL FOR PETITIONER

P.O. Box 430
Gainesville, Georgia 30503
Phone: (404) 536-0101

IN THE SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1980

KEITH FAIR, PETITIONER

Vs.

STATE OF GEORGIA, RESPONDENT.

CASE NO. 79-6884

PAUPER'S AFFIDAVIT

KEITH FAIR, being duly sworn, deposes and says:

1. I am a citizen of the United States and the petitioner in the above-entitled action.

2. Counsel was appointed to represent me on July 13, 1979, by the Hall County Superior Court.

3. I desire to petition this Court for a writ of certiorari to review the Judgment of the Georgia Supreme Court entered on April 9, 1980, rehearing denied April 29, 1980, but because of my poverty I am unable to pay the costs of such petition or give security therefor.

4. I believe that I am entitled to the redress I seek by such petition, and that such petition presents substantial federal questions.

The questions presented by such petition are as follows:

Whether, in affirming the trial court's refusal to allow petitioner to withdraw his plea of guilty prior

to pronouncement of sentence, the Georgia Supreme Court's novel construction of Georgia Code Annotated, Section 27-1404, which provides that an accused has an absolute right to withdraw his plea prior to pronouncement of sentence, has effectively denied petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the U.S. Constitution?

Whether the Georgia Supreme Court applied its novel construction of Georgia Code Annotated, Section 27-1404, in violation of the clause prohibiting ex post facto laws and in violation of petitioner's due process rights under the Fourteenth Amendment to the U.S. Constitution?

Whether, in affirming the imposition of the death sentence in petitioner's case, the Georgia Supreme Court adopted such a broad and vague construction of the Georgia Code Annotated, Section 27-2534.1(b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the U. S. Constitution?

Whether the death penalty imposed pursuant to the Georgia Code Annotated, Section 27-2534.1(b)(2) aggravating circumstance which provides, in part, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution where the petitioner is later acquitted of the underlying felony forming the basis of the statutory aggravating circumstance?

Whether the Georgia Supreme Court erred in affirming the trial court's order denying petitioner's motion to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty?

I contend that the Georgia Supreme Court erred in affirming the trial court's refusal to allow me to withdraw my guilty plea, in affirming my death sentence, in upholding the constitutionality of Georgia's death penalty statute, and in applying its novel interpretation of a Georgia statute to my case retroactively.

WHEREFORE, affiant prays that he may have leave to proceed in this Court on petition for certiorari in forma pauperis.

Keith Fair
KEITH FAIR (By George W. Brinson with Express Permission)

Sworn to and subscribed before me
this 27 day of June, 1980.

Mary Moore
Notary Public

APPENDIX A

IN THE SUPERIOR COURT OF HALL COUNTY, GEORGIA

STATE,

Plaintiff

vs.

KEITH FAIR,

Defendant

CIVIL ACTION
FILE NO. _____

PAUPER'S AFFIDAVIT

Personally appeared before the undersigned officer, authorized by law to administer oaths, KEITH FAIR the DEFENDANT in the above styled case, and on oath says that HE is, because of HIS poverty, unable to pay the advance filing costs as required by Section 24-2727 of Georgia Code Annotated. This Pauper's Affidavit is in lieu of payment of costs as provided under Section 24-3405 of Georgia Code Annotated.

Keith Fair
Affiant

Sworn to and Subscribed before me this 13 day of Sept, 1977.

N.P.
State at Large, Georgia

APPENDIX B

CERTIFICATE OF SERVICE

I, GEORGE W. BRINSON, do hereby certify that I have furnished a copy of the within and foregoing Motion for Leave to Proceed In Forma Pauperis, by mail, to:

Honorable Jeff C. Wayne
District Attorney for the
Northeastern Judicial Circuit
P. O. Box 1690
Gainesville, Georgia 30503

and

Honorable Arthur K. Bolton
Attorney General, State of Georgia
132 State Judicial Building
Atlanta, Georgia 30303

in an envelope with sufficient postage thereon to carry same to its destination.

This 27 day of June, 1980.

George W. Brinson
George W. Brinson
LEADING COUNSEL FOR PETITIONER

JUN 30 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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KEITH FAIR,

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Vs.

STATE OF GEORGIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE SUPREME COURT FOR THE UNITED STATES

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NO. _____

KEITH FAIR,

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Vs.

STATE OF GEORGIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner, Keith Fair, respectively prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on April 9, 1980.

OPINION BELOW

The Opinion of the Supreme Court of Georgia is to-date unpublished but the Slip Opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 9, 1980, affirming petitioner's conviction and sentence of death dated August 15, 1979. A timely petition for rehearing was denied on April 29, 1980. This petition for

certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether, in affirming the trial court's refusal to allow petitioner to withdraw his plea of guilty prior to pronouncement of sentence, the Georgia Supreme Court's novel construction of Georgia Code Annotated, Section 27-1404, which provides that an accused has an absolute right to withdraw his plea prior to pronouncement of sentence, has effectively denied petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the U. S. Constitution?

Whether the Georgia Supreme Court applied its novel construction of Georgia Code Annotated, Section 27-1404, in violation of the clause prohibiting ex post facto laws and in violation of petitioner's due process rights under the Fourteenth Amendment to the U. S. Constitution?

Whether, in affirming the imposition of the death sentence in petitioner's case, the Georgia Supreme Court adopted such a broad and vague construction of the Georgia Code Annotated, Section 27-2534.1(b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the U. S. Constitution?

Whether the death penalty imposed pursuant to the Georgia Code Annotated, Section 27-2534.1(b)(2) aggravating circumstance which provides, in part, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution where the petitioner is later acquitted of the underlying felony forming the basis of the statutory aggravating circumstance?

Whether the Georgia Supreme Court erred in affirming the trial court's order denying petitioner's motion to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

The Constitutional and statutory provisions are as follows:

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws.

United States Constitution, Art. I, Sec. 9, Cl. 3:

> No Bill of Attainder or ex post facto Law shall be passed.

Ga. Code Ann. §27-2534.1(b)(2):

> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

Ga. Code Ann. §27-2534.1(b)(7):

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Ga. Code Ann. §27-1404:

Upon the arraignment of a prisoner, the indictment shall be read to him, and he shall be required to answer whether he is guilty or not guilty of the offense charged in the indictment, which answers or plea shall be made orally the prisoner or his counsel. If he shall plead "guilty," such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at anytime before judgment is pronounced, the prisoner may withdraw the plea of "guilty," and plead "not guilty," and such former plea shall not be given in evidence against him on his trial.

STATEMENT OF THE CASE

The petitioner, Keith Fair, was indicted in the Superior Court of Hall County, Georgia, for the murder of Jackie Morris. On August 13, 1979, the petitioner pled guilty to the murder and submitted the issue of punishment to the trial judge without a jury. On August 15, 1979, the trial judge refused petitioner's withdrawal of his guilty plea and sentenced the petitioner to death for the murder of Jackie Morris (T-484, 487, 490, 491).

On the night of the incident giving rise to the charge, May 8, 1979, petitioner and Becky Nations were riding

around drinking and stopped at Dexter Thomas' house (T-407). Petitioner had been drinking quite a bit and, in fact, had consumed over a quart of Canadian Mist liquor (T-407). As the evening wore on a number of people congregated at Thomas' house including the Hall County victim, Jackie Morris, and Edmond Hoyt "Beetle" Turner, the Habersham County victim. "Beetle" had come in mad waving some bonds where he had gotten out of jail (T-193). As it turned out, "Beetle" was mad at Morgan Whitlock who owned a trailer in Banks County and who had had "Beetle" put in jail. Prior to arriving at Dexter Thomas' house, "Beetle" had been by Whitlock's and threatened him and told Whitlock he would be back that night (T-96-98).

Once they were all together at Thomas' house - Thomas, petitioner, "Beetle" (Habersham County victim) and Morris (Hall County victim) left in Morris' car to get some more liquor (T-194). Although four men left in Morris' (victim) car, only three came back (T-249). "Beetle" Turner was missing (T-249). Petitioner was indicted in Habersham County for the murder of "Beetle" Turner. On November 16, 1979, a Habersham County jury of twelve found petitioner <u>not guilty</u> of the murder of "Beetle" Turner. A certified copy of the indictment and verdict appears in the Appendix hereto. Virtually the exact same evidence that was presented before the trial judge in Hall County was presented in the Habersham County trial. Petitioner's counsel, as well as petitioner's Habersham County counsel, strenuously objected in the Hall County trial (victim Morris) to any and all evidence concerning petitioner's activities in Habersham County (T-124, 128, 161, 167, 200, 252, 292, 332, 359, 426, 432, 433, 437, 439, 441, 454). The basis for petitioner's objections, of course, was that the proper forum (Habersham County) to adjudicate petitioner's guilt or innocence for the murder of "Beetle" Turner had yet to decide such critical issues.

The question remained about what the group would do with the blood stained back seat of Morris' (victim) car where "Beetle" had been slain. Later in the evening on May 8, 1979, petitioner, Nations, Morris (victim), Thomas and Sherrill Land met at a Huddle House (short order restaurant) in Gainesville, Georgia (T-408, 409). Petitioner left the Huddle House and went to Bradley Highfield's house to borrow Highfield's car because petitioner's car was not operating properly (T-409, 410). Petitioner continued to drink throughout the entire evening (T-413).

By the time petitioner returned to the Huddle House, Morris (victim), Thomas and Land had already left (T-410, 411). Petitioner, Nations and Highfield subsequently re-established contact with Morris (victim), Thomas and Land (T-411).

Petitioner and the entire group then went to a dirt road in Hall County, Georgia, to burn Morris' (victim) car (T-412). Morris (victim) wanted to take a wheel off so he could report the soon to be burned car stolen (T-212). During the discussions with respect to the burning of Morris' (victim) car, petitioner and Morris began arguing "real heavy" and petitioner shot Morris (T-414). The State's expert witness, Dr. Dawson, a pathologist, recovered three bullets from the head of Morris (T-127). Dr. Dawson testified that he saw no evidence or other findings that would be consistent with a torture of the victim Morris (T-145). Such fact was conceded by the State (District Attorney's Brief, p. 24). Further, the Hall County trial judge in his report for use on appellate review responded negatively to the question on whether or not the victim had been "physically harmed or tortured? (R-98).

After Morris had been shot, petitioner and Thomas placed Morris' body in Morris' car and Thomas set fire to the car (T-416, 417). Highfield then took petitioner, Thomas, Land

and Nations home (T-417). All persons in Highfield's car were of the opinion that nothing should be said about what had occurred on that dirt road in Hall County (T-418).

When petitioner's case was called for trial, petitioner announced that he wanted to plead guilty to the murder of Morris and leave the matter of sentencing to the trial court sitting without a jury (T-3-21). After examining the petitioner, the trial court was satisfied and accepted the plea (T-19). In entering the plea of guilty, petitioner had been asked why he had killed Morris. Petitioner replied, "I don't know, it just happened all of a sudden. We was pretty drunk and we had a little argument, and I don't know what happened" (T-15).

After the sentence hearing and a night's deliberation, the trial judge orally announced that the death penalty would be imposed and petitioner immediately withdrew his plea of guilty orally and by written withdrawal (T-484, 487; R-9-22). Both the oral and written withdrawals were accomplished prior to the trial judge handing the sentence to the Clerk (T-490). However, the trial court refused petitioner's timely withdrawal (T-491). The Court's ruling was affirmed on appeal on the novel ground that no such right existed in capital felony cases.

Petitioner appealed his "conviction" and sentence to the Georgia Supreme Court on ten enumerations of error. The refusal by the trial court of petitioner's withdrawal of guilty plea and sentence was affirmed. Fair v. State, Supreme Court Case No. 35701, decided April 9, 1980; Petitioner's Motion for Rehearing before the Georgia Supreme Court was denied on April 29, 1980.

Because of the substantial constitutional claims raised by this proceeding, petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3) to review the judgment of the Court below.

REASONS FOR GRANTING THE WRIT

1. The Court below bases its approval of the trial court's refusal to permit petitioner to withdraw his plea of guilty prior to sentence pronouncement on the novel ground that Ga. Code Ann. §27-1404 does not apply in capital felonies (except treason and aircraft highjacking). Certiorari should be granted because such novel construction effectively denies petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the U. S. Constitution.

The equal protection provision of the Fourteenth Amendment to the U. S. Constitution applies to, and may be violated by, State action of every kind, including judicial action, at least insofar as unjust discrimination is concerned. Shelley v. Kraemer, U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161.

A statute constitutional on its face may in the context of a given fact situation be applied unfairly or for a discriminatory purpose in violation of the equal protection clause of the Fourteenth Amendment. U.S. v. Scotland Neck City Board of Education, 442 F.2d 575 (4th Cir. 1971).

"Our own constitutional guaranties of due process and equal protection both call for procedures which allow no invidious discrimination between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, sofar as the law is concerned, stand on an equality before the bar of justice in every American court". Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1955).

At least one Circuit has held that equal protection of the laws includes the right to be tried in the same manner as others

accused of crime are tried. Lynch v. United States, 189 F.2d 476 (5th Cir. 1951).

Thus, it deserves little argument that petitioner here has been effectively denied due process and equal protection under the law. For the past thirty-five years the law in Georgia made no distinction between which defendants have the absolute right to withdraw their guilty pleas under Code Section 27-1404. For the past thirty-five years the law in Georgia has been that a defendant has the absolute right to withdraw his guilty plea prior to sentence pronouncement and that pronouncement consists of the signing of the written sentence by the presiding judge and its delivery to the Clerk for record. Clark v. State, 72 Ga. App. 630, 34 S.E.2d 608 (1945); Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947). In Georgia the right to withdraw a guilty plea prior to pronouncement has long been held to be a procedural right "without qualification" guaranteeing "to all persons charged with crime a trial by jury." Ga. Code Ann. §27-1404; Woodward v. State, 13 Ga. App. 130, 178 S.E. 1009 (1913); Burkett v. State, 131 Ga. App. 177, 205 S.E.2d 496 (1974).

It is not disputed, nor could it be, that petitioner effectively withdrew his guilty plea in accordance with Ga. Code Ann. §27-1404. However, in an effort to avoid frustrating the electrocution of a criminal defendant, the Georgia Supreme Court adopted the unpredictable and novel position that a guilty plea may not be withdrawn as a matter of right in capital cases (except treason or aircraft highjacking). "Furthermore, to apply Code Ann. §27-1404 to such a situation would frustrate the purpose of Georgia Laws 1973, pp. 159, 171, in that the plea could be withdrawn as a matter of right after the defendant learns a death sentence has been announced. Therefore, under this construction a death sentence could never be imposed upon a guilty plea if the defendant wished to avoid it". Fair v. State, Slip Opinion, p. 17. Note the obvious concern of the

Georgia Supreme Court that death penalties be imposed.

The Georgia Supreme Court reached their alarming conclusions by holding that petitioner's case was one of first impression and that Georgia's new death penalty act, Georgia Laws 1973, pp. 159, et seq., "created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases". Unfortunately, no one bothered to inform petitioner nor his counsel, or for that matter, any other member of the State Bar of Georgia, that Georgia Laws 1973, pp. 159, et seq., had repealed, or at least modified, the vested, substantive and procedural right found in Code Section 27-1404. This Court stated in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), that "When a State Court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law, 'in its primary sense of an opportunity to 'be heard and to defend [his] substantive rights'." Citing Brinherhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

In effect, the Georgia Supreme Court by its holding legislates that capital defendants have less rights than noncapital defendants and misdemeanants. Petitioner submits that there is no meaningful distinction between capital defendants and noncapital defendants and misdemeanants such that would permit the discrimination authorized by the Georgia Supreme Court with regard to who is able to utilize the right to withdraw under Code Section 27-1404. Petitioner, who was not able to foresee the new ruling by the Georgia Supreme Court, literally staked his life on precedent. The holding of the Georgia Supreme Court denies petitioner a substantive and procedural right heretofore guaranteed by the laws of the State of Georgia,

creates and places petitioner in a class for which there is no rational basis, and effectively denies petitioner of equal protection and due process of law as guaranteed under the Fourteenth Amendment to the U. S. Constitution.

2. The application to petitioner's case of the novel construction of the Court below that Georgia Code Annotated, Section 27-1404, does not apply in capital felony cases (other than treason or aircraft highjacking) violates the prohibition against ex post facto laws and effectively denies petitioner due process of law as guaranteed by the Fourteenth Amendment to the U. S. Constitution.

In the instant decision the Georgia Supreme Court seeks to revoke the right of the petitioner to withdraw his guilty plea prior to pronouncement on the alarming grounds that it does not apply to capital offenses. What is more, the Supreme Court intends to retroactively apply this rationale to the petitioner's case, thus denying his attorneys the opportunity to adequately counsel the defendant with regard to the consequences of his plea when entered. This Court stated in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), that "When a State Court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law, 'in its primary sense of an opportunity to be heard and to defend [his] substantive rights'." Citing Brinherhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107).

Applying this rationale to the instant decision it is easy to graps the fundamental fairness of a rule which prohibits State Courts from juggling their laws in an unpredictable and

inconsistent fashion to the prejudice of federal constitutional rights. Wright v. Georgia, 373 U.S. 284, 291, 83 S.Ct. 1240, 10 L.Ed2d 349; N.A.A.C.P. v. Alabama, 357 U.S. 449, 456-458, 78 S.Ct. 1163, 2 L.Ed.2d 1488. At the time that the petitioner entered his plea it was uppermost in his mind that he had a right to withdraw this plea after sentencing but prior to the pronouncement. Petitioner could and would have been foolish not to take two bites at the apple in the fervant hope of preserving his own life. In fact, the best legal advice that could be given at the time the Petitioner entered his plea could not have and did not anticipate the bizzarre grounds the Supreme Court found for not applying this long standing procedural right to capital cases.

Any change in judicial interpretation at this point would take from petitioner a substantial right given to him by law in force at the time his plea was entered, and such an interpretation would have the effect of an ex post facto law in contravention of the Constitution of the State of Georgia (Art. I, Sec. I, Par. VII; Ga. Code Ann. 2-107) and the U.S. Constitution (Art. I, Sec. 9, Cl. 3). The Georgia Supreme Court recognized in Winston v. State, 186 Ga. 573, 196 S.E. 667 (1938):

> "Any law is ex post facto which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage." 186 Ga. at 574-575 (emphasis added).

While this language relates to a statutory enactment, there is no distinguishable difference between a new enactment which changes a defendant's rights and the abrogation of a long-standing and well-settled principle of judicial interpretation

(which, of course, has the practical effect of being a new statutory enactment).

In Todd v. State, 228 Ga. 746, 187 S.E.2d 831 (1971), The Georgia Supreme Court approved the following language from the California Supreme Court calling it a ruling of "decisive importance":

> "[A]ny law... is an ex post facto law when it... alters the situation of the accused to his disadvantage..." 228 Ga. at 751 (emphasis added).

Thus, the test adopted by the Georgia Supreme Court is one which measures the consequences of a later act; or how it alters the defendant's situation. Certainly, the consequences of any judicial reinterpretation of this statute on the petitioner are drastic indeed. Will petitioner be disadvantaged by any rein-interpretation? Obviously. Petitioner respectfully submits that any change in the law with respect to the withdrawal of guilty plea should be applied prospectively only and not retro-actively.

3. The holding of the Court below applies an unconstituional construction of the Georgia (b)(7) aggravating circumstance insofar as said holding of the Georgia Supreme Court requires the State to show no more than an "outrageously or wantonly vile, horrible and inhuman act" committed by an accused with a "depraved mind". Certiorari should be granted because this raises the same question as was raised in Godfrey v. Georgia, U.S. Supreme Court Case No. 78-6899, decided May 19, 1980, 48 USLW 4541.

Godfrey, supra, mandates that the facts of any death case must provide fair evidentiary support for a finding that it falls

within the narrow construction of Section (b)(7). A finding without fair support in the record is by definition arbitrary and capricious, Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), and cannot supply any "principled way to distinguish [a]. . . case, in which the death penalty was imposed, from the many cases in which it was not." 48 USLW at 4545. Where federal rights are at stake, factual findings upon which their denial turns are subject to plenary and independent federal review on appeal. See, e.g., Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Haynes v. Washington, 373 U.S. 503, 513-516, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963), and cases cited.

The lack of factual support for a properly limited construction of Section (b)(7) is apparent in petitioner's case from the testimony of Dr. Byron Dawson, pathologist at the Georgia State Crime Lab (T-145):

> "Q. Dr. Dawson, I asked you whether or not in your autopsy of Jackie Morris, and in your medical opinion, and from your experience as a pathologist whether or not you found any evidence whatsoever of torture, and I believe that your response was that you did not find any such evidence, is that correct?"
>
> "A. That's correct, again with the qualification that were there or had there been injuries which were destroyed by the fire then that would be a different story, but withstanding those -- or imposing that qualification the answer

is -- well, I forget now how you phrased it, but the answer is that I saw no evidence that would be . . or, no injuries, or other findings that would be consistent with a torture."

Dr. Dawson testified further that although the body of Jackie Morris had been burned, that this was done after death and therefore could not be considered a torture to the victim or aggravated battery (T-143). Dawson's testimony further raised the reasonable conclusion that although Morris was shot at least three times, two shots were fired in the head of the victim and that if either of those two shots were fired first, the victim was rendered unconscious rapidly and had no conscious sense of further pain (T-136, 137, 143-144). The State having the burden of showing the existence of this aggravating circumstance beyond a reasonable doubt, the evidence failed to exclude the reasonable hypothesis that Morris was shot in the head initially and thereafter had no conscious pain or suffering, regardless of subsequent shots or the like. The fact that no physical suffering or torture was involved in petitioner's case was conceded, or at least not contested, by the State (District Attorney's Brief, p. 24). Further, the Hall County trial judge in his report to the appellate courts responded negatively to the question on whether or not the victim had been "physically harmed or tortured" (R-98).

In Harris v. State, 237 Ga. 718 (732-733), 230 S.E.2d 110-111 (1976), the Georgia Supreme Court held that this aggravating circumstance (Section (b)(7)) involves both the effect on the victim, viz., depravity of mind. As to both parties the test is that the acts (the offense) were "outrageously or wantonly vile, horrible or inhuman" (Emphasis added).

Subsequently, in Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977), the Georgia Supreme Court held that the depravity of mind contemplated by the statute (Section (b)(7)) is that which results in torture or aggravated battery to the victim. 239 Ga. at 299, 236 S.E.2d at 643. That is to say, that the word "torture", must be construed in para materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

It rapidly becomes apparent that the circumstances of petitioner's case do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases. Any attempt by the Georgia Supreme Court in their Addendum Opinion dated June 24, 1980, to justify their decision in petitioner's case in light of Godfrey is misplaced insofar as the distinction drawn in Godfrey is not between murders and "ordinary murders." See Addendum Opinion, pp. 1 and 2 (Appendix). Thus, in light of the U. S. Supreme Court's recent decision in Godfrey v. Georgia, 48 USLW 4541 (May 19, 1980), the Georgia Supreme Court has adopted such a broad and vague construction of the Section (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the U. S. Constitution.

4. This Court should grant certiorari because the decision below approves the imposition of the death penalty based on a felony for which the accused is later acquitted. Such construction of Ga. Code Ann. §27-2534.1(b)(2) violates the Eighth and Fourteenth Amendments to the U. S. Constitution.

Death as a punishment is unique in its severity and irrevocability. Gregg v. Georgia, 428 U.S. 153, 187; Furman v. Georgia, 408 U.S. 238, 286-291. Because it is the most

extreme of sanctions, it must be reserved for the most extreme of crimes.

In sentencing petitioner in this case, the trial court recommended death in that the murder of Jackie Morris was committed while in the commission of another capital felony, to-wit: the murder of Edmond Hoyt "Beetle" Turner in Habersham County, Georgia (T-492-494).

However, as is shown by the verdict attached to the Appendix hereto, petitioner subsequently went to trial for the murder of Turner and was acquitted. Thus, the underlying felony which was the basis of the aggravating circumstance justifying the death sentence in petitioner's case can no longer serve as the springboard for a death sentence.

In its death penalty scheme (Ga. Code Ann. §27-2534.1) the legislative specification of a capital felony as an aggravating circumstance is plain, viz: there must be a nexus between the elements of a capital felony performed by the defendant and the murder in question. The subject crime must be done "while the offender was engaged in the commission of another capital felony... ." (Emphasis added). The language of the statute itself requires that the underlying felony be committed by "the offender". Since the death penalty is the most serious punishment a State may impose; it would be antithetical to the finality of this punishment and the obvious intent of the legislature to allow a State to use this statutory circumstance as an excuse rather than a justification for imposition of the death penalty.

The Georgia Supreme Court misconstrued Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974), in holding that the subsequent acquittal of petitioner in Habersham County simply had no bearing on the issue of whether the trier of fact was

was presented with sufficient evidence to find beyond a reasonable doubt and the existence of an aggravating circumstance. It is true that Hooks stands for the rule that it is not required that a defendant be convicted of the crime introduced as an aggravating circumstance. However, it is readily apparent that a lack of conviction is entirely different from an acquittal! An acquittal is defined as "the legal and formal certification of the innocence of a person who has been charged with crime", Black's Law Dictionary, Fourth Edition.

This Court held in Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), that it was as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

The rule in Cole, supra, was followed as recently as 1978, in Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). In Presnell, the Georgia Supreme Court held that the State could not rely upon sodomy as constituting the bodily injury associated with kidnapping. Nonetheless, despite the fact that the jury had been instructed that the death penalty for murder depended upon a finding that it was committed while petitioner was engaged in "kidnapping with bodily injury, aggravated sodomy" the Georgia Supreme Court upheld the third death penalty imposed by the jury. It did so on the theory that, despite the lack of a jury finding of forcible rape, evidence in the record supported the conclusion that petitioner was guilty of that offense, which in turn established the element of bodily harm necessary to make the kidnapping a sufficiently aggravating circumstance to justify the death sentence. The actions of the Georgia Supreme Court in Presnell violated petitioner's due process rights.

In a similar fashion as in Presnell, the Georgia Supreme Court has violated this petitioner's due process rights. The rule espoused in Cole and Presnell can be logically extended so as to apply to this petitioner's situation: "It is as much a due process violation to send an accused to death based on a charge for which he was acquitted as it would be to send an accused to prison following conviction of a charge on which he was never tried or to convict him upon a charge that was never made." Cole v. Arkansas, supra, and particularly Presnell v. Georgia, supra, bear directly on petitioner's case and command a finding by this Court that petitioner's due process rights were violated thereby rendering the death sentence imposed unconstitutional.

Further, imposition of the death penalty based on the Section (b)(2) aggravating circumstance would be cruel and unusual in that the death penalty would be excessive, disproportionate and arbitrary. The U.S. Supreme Court has devoted consideration to such criteria with respect to the determination of whether a particular punishment is "cruel and unusual". In Rudolph v. Alabama, 375 U.S. 889, 84 S.Ct. 155, 11 L.Ed.2d 119, Reh. den. 375 U.S. 719, 84 S.Ct. 204, 11 L.Ed.2d 158, in a dissenting opinion from the denial of a petition for certiorari, Justices Goldberg, Douglas and Brennan expressed the view that among the criteria to be considered in determining whether a punishment was cruel and unusual were whether the punishment, by its excessive severity, was greatly disproportionate to the offense charged; whether the permissible aims of punishment, such as deterrents, isolation, and rehabilitation, could be achieved as effectively by punishing an offense less severely; and whether, if the permissible aims of punishment could be achieved as effectively by punishing an offense less severely. In opinions by several members of the Court, in Furman v. Georgia, supra, attention was devoted to the question whether punishment

was inflicted arbitrarily.

If appellate review is to be effective in guarding against the arbitrariness in administration that the controlling opinions in Furman decided made the death penalty statutes of 1972 unconstitutional, a Court considering or reviewing the appropriateness of the death sentence must be in a position to evaluate the factors relied upon in reaching the death sentence. In petitioner's case, it is now impossible to perform this duty. This Court, as the Georgia Supreme Court could not, cannot know the extent to which the trial court was influenced by what it obviously assumed was petitioner's guilt for the murder of "Beetle" Turner in Habersham County. Stated more generally, the Georgia Supreme Court was not in a position to fulfill the duty of careful appellate review because there was an unresolved "critical issue in the punishment phase of the trial", Green v. Georgia, 99 S.Ct. 2150, 2651, i.e., whether petitioner had actually participated in and was responsible for the death of Edmond Hoyt "Beetle" Turner. Each and every factor contributing to the finding of an aggravating circumstance may tip the delicate balance between life and death; and, if a death sentence is returned, the part played in it by any single factor which the trier of fact found in this case "can only be the subject of sheer speculation." Godfrey v. Georgia, 48 USLW 4541, 4544 (May 19, 1980).

Should death sentences be upheld on the basis of underlying felonies for which the defendant is later acquitted, a substantial risk develops that the death penalty will be imposed arbitrarily and capriciously on any defendant who is charged with more than one felony arising out of a homicide. This risk of capriciousness was especially highlighted in petitioner's case, and, in fact, the risk became incredulous reality for the petitioner.

The Georgia Supreme Court attempts to justify their alarming decision in their addendum opinion by citing this Court's decision in Standefer v. U.S., 48 USLW 4634 (June 9, 1980). The Georgia court's emphasis is misplaced for multiple reasons. The most important distinctions are that in petitioner's case we are not dealing with an accessory and his principal (two defendants), but one (petitioner), and in petitioner's case we are dealing with a man's life and not a revenue violation.

5. This Court should grant certiorari to consider whether the Georgia statute providing for the imposition of the death penalty violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

The Georgia statute providing for the imposition of the death penalty should be quashed and held unconstitutional in that it is applied in a way that violates the constitutional prohibition against the use of cruel and unusual punishment in violation of the Eighth and Fourteenth Amedments to the U.S. Constitution and the rule of law espoused and mandated in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is discretionary and is applied discriminatorily against classes of defendants in violation of the due process and equal protection clauses of Art. I, Sec. I, Pars. II and III, of the Georgia Constitution (Ga. Code Section 2-102) and of the Fourteenth Amendment to the U.S. Constitution.

The categories of aggravating circumstances in Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) are applied in an unreasonable and arbitrary manner in violation

of the equal protection clause of Art. I, Sec. I, Par. II, of the Georgia Constitution (Ga. Code Section 2-102) and of the Fourteenth Amendment to the U.S. Constitution.

Georgia Laws 1974, pp. 352, 353 (Ga. Code Section 27-2302) allows subjective discretion in applying the death penalty in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

Georgia Laws 1973, pp. 159, 165 (Ga. Code Section 27-2537(f)) provides for the collection of data on sentences imposed in capital felony cases after January 1, 1970, for purposes of reviewing death sentences as excessive, disproportionate or arbitrary. The statutory check against the arbitrary and discriminatory application of the death penalty is not being complied with, thereby depriving defendants' sentences to death of an effective or adequate review of their sentence in violation of due process of law.

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is applied arbitrarily and discriminatorily against certain classes of defendants in violation of the due process and equal protection clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code Sections 2-102, 2-103) and the Fourteenth Amendment to the U.S. Constitution, in that the Georgia Supreme Court compares death cases only with those cases in which a death sentence has been received and in which it has upheld that death sentence.

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is applied arbitrarily and discirminatorily against certain classes of defendants in violation of the due process and equal protection clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code Sections 2-102, 2-103) and the Fourteenth Amendment to the U.S. Constitution, and in violation of the United States Supreme Court's mandate in

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 849 (1976), in that the Georgia Supreme Court does not submit written findings comparing cases in which it reviews death sentences with similar cases, but merely lists other cases and states that it has made the required comparison. Such a procedure prohibits a defendant from challenging the affirmation of his/her death sentence as arbitrary and discriminatory, because the defendant is given no notice as to which permissible factors the Court has used in such comparison.

The thrust of the United States Supreme Court's decision in Gregg v. Georgia, supra, in upholding Georgia's post-Furman capital punishment statute was the availability of meaningful, informed appellate review of death sentences. The reviewing court must be in a position to evaluate the factors relied upon by the trial court in reaching the death verdict. The Georgia Supreme Court blithely rejects the notion that petitioner's subsequent acquittal of the murder of "Beetle" Turner "has no bearing on the issue" of whether the trial court could consider the Habersham County "evidence" in reaching his sentencing decision. Neither the sentencing Court nor the Georgia Supreme Court was in a position to fulfill its duty of careful appellate review because there is and was an unresolved "critial issue in the punishment phase of the trial" (Green v. Georgia, _____U.S._____, 99 S.Ct. 2150, 2651, 60 L.Ed.2d 738, to-wit: the unresolved killing of "Beetle" Turner in Habersham County for which the petitioner has been certified as innocent of said crime.

Moreover, the cases cited in the Appendix to the Georgia Supreme Court opinion illustrate the lack of meaningful review. The cases cited are not all post-Section 27-2528 cases, nor do they deal with the factual or legal issues before the Court. The cases considered by the Georgia Supreme Court under

Ga. Code Ann. §27-2537 are neither similar nor do they address the issues presented to the Georgia Supreme Court. Lack of meaningful review deprived petitioner of his rights under both the U.S. and Georgia Constitutions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GEORGE W. BRINSON, do hereby certify that I have furnished a copy of the within and foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia, by mail, to:

Honorable Jeff C. Wayne
District Attorney for the
Northeastern Judicial Circuit
P. O. Box 1690
Gainesville, Georgia 30503

and

Honorable Arthur K. Bolton
Attorney General, State of Georgia
132 State Judicial Building
Atlanta, Georgia 30303

in an envelope with sufficient postage thereon to carry same to its destination.

This 27 day of June, 1980.

George W. Brinson
George W. Brinson
LEADING COUNSEL FOR PETITIONER

APPENDIX

In the Supreme Court of Georgia

Decided: APR 09 1980

35701. FAIR v. STATE

BOWLES, Justice.

Keith Fair, the appellant, pled guilty in the Superior Court of Hall County to the murder of Jackie Morris. The trial judge, after a two day pre-sentence trial, found the existence of two statutory aggravating circumstances and imposed the death penalty. The case is here on direct appeal.

This case involves two killings by appellant. The trial judge, as the finder of fact, was authorized to find that the first killing occurred in Habersham County as a result of a dispute over a money matter. Apparently the Habersham County victim had hired appellant to burn a trailer for him and then did not have the money to pay. In front of his other accomplices, including Jackie Morris, hereinafter the Hall County victim, appellant shot the Habersham County victim at point blank range in the face, then threw him on the ground and shot him again, laughing all the while. The body was disposed of in Lake Lanier.

Later that night, appellant determined that the Hall County victim would have to be killed as well since he had been a "rat" in prison. Appellant pretended to need help with a wheel on an automobile and when the victim leaned over to help, appellant shot him in the head, laughing and saying, "you wasn't nothing but a rat you son-of-a-bitch no way, you pulled a knife on me when I was thirteen years old and scared the hell out of me." The body was placed in the car; the victim's throat was cut by another accomplice; and the car was set on fire.

After his arrest, the appellant bragged about the killing of the Hall County victim to other inmates. He also stated that when he got out he was going to kill the other witnesses. In conversation with other inmates he said that he was not sorry about the killing and did not lose any sleep over it. Appellant escaped from jail with another inmate to whom he admitted both killings. During the period he was a fugitive, he told the inmate he escaped with that the victims were criminals like him and deserved it but that he did not want to be shot because when he shoots people they "squeal like it hurts." Appellant was re-captured within a day and a half.

1. The appellant attacks the constitutionality of the Georgia Death Penalty Statute, Ga. Laws, 1973, pp. 159, et. seq. (Code Ann. § 27-2634.1) as written and applied. Both this court and the Supreme Court of the United States have upheld the constitutionality of the Georgia statute in a number of cases and appellant has advanced no new reason for us to reconsider our position. See Gregg v. Georgia, 428 U. S. 153 (1976); Eberheart v. State, 232 Ga. 247 (206 SE2d 12) (1974); McCorquodale v. State 233 Ga. 369 (211 SE2d 517) (1974); Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976); Mason v. State, 236 Ga. 46 (222 SE2d 339) (1976); Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Legare v. State, 243 Ga. 744 (257 SE2d 247) (1979). Appellant's first enumeration of error is without merit.

2. The appellant in his second enumeration of error argues that the trial court erred in admitting evidence of the murder of the Habersham County victim and relying upon that evidence in its finding of one of the statutory aggravating circumstances warranting the death penalty.

Appellant was given proper notice that the evidence of the Habersham County murder would be tendered in aggravation. At the

pre-sentence trial, his appointed attorney in the Habersham County case advised appellant to assert his Fifth Amendment privilege as to any question concerning the first murder. However, this in itself would not have prevented appellant from presenting evidence in defense of the Habersham County murder before the trial court in the instant case. The appellant had to choose which course to follow. Though a defendant may have a right, even a constitutional right to follow a certain course of action, it does not necessarily follow that to require him to choose a course of action is constitutionally forbidden. Decisions as to what course to follow in a criminal case are many times difficult. See McMann v. Richardson, 397 U. S. 759 (1970). The appellant contends that the evidence of the Habersham murder should not have been introduced against him in aggravation because he had only been charged with that murder, had not been convicted, but was awaiting trial thereon. It is the rule in this state that it is not required that a defendant be convicted of the crime introduced as an aggravating circumstance. Hooks v. State, 233 Ga. 151 (210 SE2d 688) (1974); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979). Appellant's reliance upon Code Ann. § 27-2534.1(b)(1) is

misplaced in that the record clearly shows that the state relied upon and the trial court found that the murder occurred during the commission of another capital felony. Code Ann. § 27-2534.1 (b) (2).

Appellant further argues that the evidence was totally irrelevant and, therefore, inadmissible. We do not agree. The first murder was committed within hours of the second. The motive for the murder of the Hall County victim was to silence him so he would not be able to testify against the appellant regarding the first murder. The arson of the trailer, the murder in Habersham County, the murder in Hall County and the arson of the car in Hall County were all part of a continuous transaction and all were mutually dependent crimes. Collins v. State, 239 Ga. 45 (235 SE2d 523) (1977); Stewart v. State, 239 Ga. 588 (238 SE2d 540) (1977). Had the appellant plead not guilty and elected to go to trial on guilt-innocence, the evidence complained of would have been admissible to show scheme, motive, or intent. McClesky v. State, 245 Ga. 108 (SE2d) (1980). It, therefore, follows that such evidence was certainly admissible during the pre-sentence trial in which additional evidence, not admissible

during the guilt-innocence phase, is allowed. Code Ann. § 27-2503. See, Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978). Furthermore, such evidence is not inadmissible on the ground that it places the defendant's character in evidence. During the pre-sentence hearing, the State, subject to notice limitations, is allowed to place the defendant's character in issue through his prior record or other criminal acts. Code Ann.§§ 27-2503; 27-2534.1. A defendant in a capital case stands before the trial court or jury in a pre-sentence trial a convicted felon with no presumption of innocence. All aspects of his crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. See, Lockett v. Ohio, ____ U. S. _____ (98 S. C. 2954) (1978); Collier v. State, supra.

Appellant asserts that the trial court's finding that the offense of murder occurred while the offender was engaged in another capital felony: to-wit, the murder of the Habersham County victim, cannot stand because at his subsequent trial for that offense in Habersham County, the appellant was acquitted.

Appellant's subsequent acquittal is not part of the record in this case. Nevertheless, assuming such an acquittal, we find no error. Necessarily, two different triers of fact were involved. Different triers of facts may reach different results. See, Chaffin v. Stynchcombe, 412 U. S. 17 (1973). Under our statute, the fact finder in a pre-sentence trial must determine whether beyond a reasonable doubt any of the statutory aggravating circumstances exist under the evidence presented. Code Ann. §§ 27-2503; 2525, 2534.1. A review of the evidence presented to the trial judge in this case overwhelmingly supports a finding by a rational trier of fact that the appellant was engaged in the commission of another murder when he killed the Hall County victim. Jackson v. Virginia, ____ U. S. _____ (99 S. Ct. 2781) (1979).

In the instant case, the murders were committed in separate counties which of necessity required that one murder be tried before the other.[1/] The subsequent acquittal simply has no bearing on the issue of whether the trier of fact is presented with sufficient evidence to find beyond a reasonable doubt the existence of an aggravating circumstance.

1/ What evidence may have been presented in the second murder trial regarding the first homicide is not before the court, but we can unhesitatingly say that the evidence of the first homicide presented in the instant case was entirely sufficient to prove it.

3. The trial court also found an additional aggravating circumstance in that the murder of the victim in this case was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant. The appellant argues that such a finding under Code Ann. § 27-2534.1 (b)(7) is incomplete in that the statute requires a finding of either torture or aggravated battery in addition to a finding of depravity of mind. Code Ann. § 27-2534.1(b)(7) provides as follows: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The statute is worded in the disjunctive, not the conjunctive. It is not required that a trier of fact find the existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute. Furthermore, this court has upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977).

The evidence supports a finding of this aggravating circumstance by a rational trier of fact beyond a reasonable doubt, Jackson v. Virginia, supra.

The evidence shows that the appellant killed his accomplice in an arson case who also happened to be a witness to a murder to prevent any chance the victim would testify against him. It was cold blooded, performed in a methodical, execution-type manner, and the body was burned to destroy any evidence against the appellant. The appellant laughed during the murder of his victim, cursed him and later told others he did not lose any sleep over the killing. He described how people "squealed" when he shot them. Such evidence shows a vile, inhuman murder due to a complete and absolute disregard for human life which is shocking to the conscience of civilized man. It cannot be argued that such actions on the part of the appellant do not evidence a complete depravity of mind. Appellant's third enumeration of error is, therefore, without merit.

4. In his fourth and eighth enumerations of error, the appellant argues that the court erred in admitting evidence of the subsequent escape from jail and his conversations with other inmates. The appellant contends the evidence is inadmissible because it places his character in evidence. As noted above, the instant case was a pre-sentence trial. The appellant admitted

his guilt in open court and waived any right to trial on guilt or innocence. The purpose of a pre-sentence trial is to introduce different evidence from that at trial to determine guilt or innocence. On the issue of guilt or innocence, the only relevant evidence is that which pertains to the offense with which the defendant is charged. In a pre-sentence trial the trier of fact must make a determination as to the sentence to be imposed, taking into consideration all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character. Johnson v. State, 126 Ga. App. 757 (191 SE2d 614) (1972); Code Ann. §§ 27-2503, 2528, 2534.1. Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute. Each case is necessarily different; however, such evidence, by way of illustration, may consist as it did here of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes. See, Ingram v. State, 134 Ga. App. 935

(216 SE2d 608) (1975). In a capital felony pre-sentence trial, the State is not limited to the introduction of evidence to support the particular statutory aggravating circumstances it is relying upon. Upon review of the record, we conclude that the evidence was relevant to sentence and admissible. The evidence being admissible, the trial court did not abuse its discretion in failing to allow the withdrawal of the appellant's guilty plea on the ground that sentence was based upon erroneously admitted evidence.

5. In his fifth enumeration of error, appellant asserts error in the introduction of photographs of the bodies of his victims over objection. This enumeration is clearly without merit, especially in view of the fact that such evidence was presented to the trial judge sitting without a jury. Tucker v. State, 245 Ga. 68 (___ SE2d ___) (1979); Stevens v. State, 242 Ga. 34 (247 SE2d 838) (1978); White v. State, 242 Ga. 21 (247 SE2d 759) (1978); McCorquodale v. State, supra. See Ingram v. State, supra.

6. Appellant contends in his sixth enumeration of error that the trial judge did not consider the appellant's intoxication as a mitigating factor in imposing sentence. While it is undisputed

that the appellant was drinking intoxicating beverages on the day in question, there was no evidence presented which in any manner showed that the appellant was so intoxicated as to not be able to form the requisite criminal intent nor understand the nature of his actions. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979). Plaintiff argues that the trial judge did not include intoxication to the extent of impairment of intent and ability to comprehend the criminality of his actions as a mitigating circumstance on the judge's report. However, this does not indicate that the judge failed to consider it as a possible mitigating circumstance.

The appellant relies on an isolated portion of the judge's sentence to show that the trial court failed to take into consideration any mitigating circumstances and sentenced solely on the basis that statutory aggravating circumstances were found, thereby requiring the imposition of a death penalty. Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1972). However, a review of the record in this case shows that the judge considered all the circumstances both in mitigation and aggravation in arriving at his sentence. In fact, the trial judge recited that he considered all the evidence, both in aggravation and mitigation in his finding of

aggravating circumstances as required by Code Ann. § 27-2525. Spivey v. State, supra.

7. The appellant upon call of the case tendered a guilty plea. The trial court exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given. The court thereafter informed the appellant and his counsel that the court was not conscientiously opposed to capital punishment and would impose such a sentence if the facts warranted it. The court then required the appellant to confer with his counsel and recessed for that purpose. Thereafter, the appellant again insisted on a guilty plea. A pre-sentence trial was held pursuant to Code Ann. §§ 27-2528, 27-2503 and 27-2534.1. The State introduced proof not only of the aggravating circumstances but of the crime itself. After the trial court made its findings of fact and orally announced sentence the appellant moved to withdraw his plea. Withdrawal came prior to the clerk receiving the sentence and spreading it upon the record. Appellant enumerates as error the trial judge's refusal to hold an evidentiary hearing to correct the record. However, the appellant's attorney was allowed to perfect the record, and the record adequately reflects the

attempt to withdraw the plea prior to the clerk's receiving it. Neither the trial judge nor the State contest appellant's assertion that the withdrawal came prior to the clerk's receiving the sentence. Appellant's ninth enumeration of error is without merit. See, Patterson v. State, 233 Ga. 724 (213 SE2d 612)(1975); Code Ann. § 6-805(f).

8. Appellant asserts error on the trial court's refusal to allow withdrawal of his guilty plea. The appellant contends that at any time prior to the sentence being received by the clerk and entered upon the docket, a defendant, as a matter of right, may withdraw his plea of guilty. Appellant cites as authority Code Ann. § 27-1404 and cases decided thereunder. Code Ann. § 27-1404 provides in relevant part as follows:

> "...If he shall plead 'guilty,' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,' and such former plea shall not be given in evidence against him on his trial."2/

2/ The statute first appeared at page 834 in Cobb's Digest of the Laws of the State of Georgia published in 1851. Under the common law, a prisoner had no absolute right to withdraw his plea either before or after sentence. Therefore, the statute is in derogation of the common law. Woodward v. State, 13 Ga. App. 130 (78 SE 1009) (1913), dissent of Pottle, J.

The question thus presented is whether or to what extent Code Ann. § 27-1404 applies to Ga. Laws 1973, p. 159 et. seq. which provided for comprehensive new procedures in capital felony cases.

This is a question of first impression as guilty pleas are rare when the State has not waived the death penalty.[3/] From 1956 until the present death penalty statute, if a defendant plead guilty and such a plea was accepted, the maximum penalty that could be imposed was life imprisonment. Ga. Laws 1956, p. 737 (Former Code Ann. § 27-2528). However, under the new Act, there is no such limitation and the trial judge, provided he finds the existence of a statutory aggravating circumstance, may impose a death penalty. Ga. Laws 1973, pp. 159, 171 (Code Ann. § 27-2528).

The present death penalty statute, Ga. Laws 1973, p. 159 et. seq. created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases. The statute requires a finding by the trier of fact of at least one specific statutory aggravating circumstance before a death sentence is authorized. The State must prove the existence of such an aggravating circumstance beyond a reasonable doubt.

3/ There are only two cases involving a plea which resulted in a sentence of death under the present statute; Hooks v. State, 233 Ga. 149 (210 SE2d 688) (1977) and Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975). These cases do not address the question.

The trial of a capital felony is, therefore, in two parts: one to determine guilt or innocence and the other to determine sentence. In both phases, the State carries the burden of proof. In a non-capital felony, the judge conducts a pre-sentence hearing to determine sentence and the State may tender evidence of aggravation if it so chooses, but no factual finding is required to authorize imposition of any sentence within the statutory limits. Code Ann. § 27-2503.

Against this background we must construe the two statutes in question, keeping in mind the legislative intent, the old law, the evil and the remedy. Code Ann. § 102-102.

The purpose of the withdrawal provision of Code Ann. § 27-1404 is to provide a necessary part of the plea bargaining procedure, Smith v. State, 231 Ga. 23 (200 SE2d 119) (1973). Its provisions have been held to apply to nolo contendre pleas, Wright v. State, 75 Ga. App. 764 (44 SE2d 569) (1947), but not to pleas which result in first offender treatment, Heath v. State, 148 Ga. App. 559 (252 SE2d 4) (1978), because to do so would frustrate the purpose of the First Offender Act.

Where a plea of guilty is entered in a capital felony case and the State seeks the death penalty under Code Ann. § 27-2534.1,

plea bargaining is not involved nor could it ever be involved. Therefore, Code Ann. § 27-1404 would have no purpose under such a circumstance. Furthermore, to apply Code Ann. § 27-1404 to such a situation would frustrate the purpose of Ga. Laws 1973, pp. 159, 171, in that the plea could be withdrawn as a matter of right after the defendant learns a death sentence has been announced. Therefore, under this construction a death sentence could never be imposed upon a guilty plea if the defendant wished to avoid it.

Where a plea of guilty is filed in a non-capital felony, the judgment does not rest upon the results of a trial, but upon the plea, which is nothing more than a confession in judicio. Code Ann. § 27-1404 provides that the court, "...shall pronounce... the judgment, in the same manner as if he had been convicted of the offense by the verdict of a jury." However, in capital cases, the judgment does not rest upon the plea but rather upon the plea and the proof of an aggravating circumstance except in rare cases of treason or aircraft hijacking.[4/] Code Ann. § 27-2534.1(a). Capital cases, therefore, require further proceedings in all but two instances, a procedure not envisioned by Code Ann. § 27-1404. The decision of the trial court after a sentencing trial is

4/ The reports contain no such cases under the new statute, in which a death penalty was given.

tantamount to a jury verdict. For this reason and the others enumerated herein, this court concludes that the provisions of Code Ann. § 27-1404 relating to withdrawal of guilty pleas as a matter of right do not apply to guilty pleas tendered in capital cases other than treason or aircraft hijacking in which the State seeks the death penalty.[5/] We hold that a guilty plea, voluntarily and knowingly entered in a capital felony case other than treason or aircraft hijacking wherein the State seeks the death penalty under Ga. Laws 1973, p. 159 et. seq. may not be withdrawn as a matter of right.

9. In his last enumeration of error the appellant contends that the trial court erred in denying appellant's motion for new trial on general grounds and on the grounds previously considered. This enumeration has no merit. Upon review of the transcript and record we find that the verdict is factually substantiated and that the evidence supports such a verdict by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

10. As mandated by the statute, Ga. Laws 1973, pp. 159, 165 (Code Ann. § 27-2537) we have reviewed the transcript and record

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5/ Nothing herein should be construed as approval by this court of the Court of Appeals' interpretation of Code Ann. § 27-1404 as permitting withdrawal of a guilty plea after sentence is orally pronounced.

in this case as we have in all prior cases under this statute. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find the similar cases listed in the appendix support affirmance of the death penalty.

Appellant's sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Hill, J., concurs specially.

APPENDIX

1. Henderson v. State, 227 Ga. 68 (179 SE2d 76) (1971
2. Kramer v. State, 230 Ga. 855 (199 SE2d 805) (1973)
3. Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974)
4. Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975)
5. Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978)
6. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
7. Burger v. State, 242 Ga. 28 (247 SE2d 834) (1978), aff'd on resentencing _____ Ga. _____ #35709, decided 3/14/80
8. Ruffin v. State, 243 Ga. 95 (252 SE2d 172) (1979)
9. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979)
10. Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979)
11. Dampier v. State, _____Ga. _____ #35378, decided 2/20/80

HILL, Justice, concurring.

I concur in the judgment affirming the death penalty on the basis of the aggravating circumstance discussed in division 3 of the opinion, but not on the basis of the aggravating circumstance described in division 2, to wit: the Habersham murder of which the defendant was later acquitted.

Please substitute page 15. Non-material change.
Citation added to footnote #3.

The question thus presented is whether or to what extent Code Ann. § 27-1404 applies to Ga. Laws 1973, p. 159 et. seq. which provided for comprehensive new procedures in capital felony cases.

This is a question of first impression as guilty pleas are rare when the State has not waived the death penalty.[3/] From 1956 until the present death penalty statute, if a defendant plead guilty and such a plea was accepted, the maximum penalty that could be imposed was life imprisonment. Ga. Laws 1956, p. 737 (Former Code Ann. § 27-2528). However, under the new Act, there is no such limitation and the trial judge, provided he finds the existence of a statutory aggravating circumstance, may impose a death penalty. Ga. Laws 1973, pp. 159, 171 (Code Ann. § 27-2528).

The present death penalty statute, Ga. Laws 1973, p. 159 et. seq. created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases. The statute requires a finding by the trier of fact of at least one specific statutory aggravating circumstance before a death sentence is authorized. The State must prove the existence of such an aggravating circumstance beyond a reasonable doubt.

3/ There are only three cases involving a plea which resulted in a sentence of death under the present statute; Hooks v. State, 233 Ga. 149 (210 SE2d 688) (1977); Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975) and Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975). These cases do not address the question.

In the Supreme Court of Georgia

JUN 24 1980

35701. FAIR v. STATE

ADDENDUM

(a) Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States has decided Godfrey v. Georgia, 48 LW 4541 (May 19, 1980). In that the appellant's sentence of death rests partially[1/] upon Ga. Code § 27-2534.1(b)(7), his sentence must be reviewed in light of Godfrey.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder. . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey, the court found that § (b) (7) was unconstitutionally applied in that case. We find material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate.

1/The judge found the existence of two statutory aggravating circumstances, Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on § 27-2534.1(b)(7). Godfrey v. Georgia, 48 LW 4541, n.15. The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, 48 LW 4541, 4542, n.2. Therefore, under our decisions, the death penalty, infra, may be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State, 245 Ga. 458 (SE2d) (1980).

In our opinion in this case, we held that the trial court's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant, was supported by the evidence. That evidence showed that appellant had had no quarrel with his victim. Rather the victim was killed simply because he had witnessed appellant's previous murder and appellant was afraid he would testify against him. While pretending they were still friends, appellant lured the victim into a vulnerable position and then shot him in the head. Aside from laughing during the killing itself, appellant showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail. Appellant's accomplice cut the victim's throat and appellant then burned the body. A defendant who mutilates or seriously disfigures a victim's body after death (cf. Code Ann. § 26-1305), may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute. (See Hance v. State, Case No. 36012, Decided June 24, 1980, after the main opinion in this case.) Appellant's actions in this case take this murder out of the category of "ordinary murders."